No. 11,029

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

LA SOCIETE FRANCAISE DE BIENFAISANCE MUTUELLE (a corporation),
Appellee.

On Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The following supplements the brief for appellant.

1. Taxpayer was incorporated in 1856 (R. 38)

2. The entire by-law, a portion of which appellant quotes, provides:

> "The Society is founded on the basis of mutuality for the treatment of sick members; neither political nor religious questions can even be considered in its midst."

The emphasis evidently is on plaintiff's non-political and non-sectarian character and the treatment of the

sick, rather than upon restriction of benefits to members. That no such restriction exists is shown by its charitable activities. Its certificate of incorporation is silent on this point.*

3. Appellee also furnishes other forms of gratuitous relief:

(a) In the case of indigent member-widows and other needy members, their dues, at the discretion of the Board of Directors, are paid from appellee's relief fund set up, in 1905, for that purpose, and since added to, (R. 43);

(b) At the Board's discretion, other indigent members are cared for in illness without charge, and without limit of time, and are furnished private rooms and other needed facilities, (R. 43);

(c) Although members are entitled, without charge, to six months' hospitalization, in tuberculosis cases the time of hospitalization is unlimited, (R. 44);

(d) A member under seventeen years, if orphaned or abandoned by his parents, pays no dues, nor do members in the armed forces of the United States nor student nurses who are members, (R. 43);

(e) Aged members can be admitted to the old people's home without the payment of any charge, (R. 42);

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*This certificate (Plff's Exh. No. 11) does not state the purposes of the society nor seek to limit its benefits to members. It is signed by the "Judges of the Election" held by it May 4, 1856, and, as required by the statute, merely certifies that, on that date, the members met for the purpose of incorporating themselves and, by a plurality of votes, elected fifteen trustees and determined that said trustees and their successors should forever be called and known by the name appellee still bears.

4. The fifteen beds in the Old People's Home are at all times fully occupied, (R. 42). Admission thereto is not upon any fixed schedule of rates nor upon any profit making basis, but upon the applicant's needs and ability (if any) to pay and upon social and humane considerations.

5. Appellee has always admitted new members, (R. 43).

6. Applicants need only be partly of French descent, and members of the family of a qualified member can be admitted, (R. 137).

7. No dividends, interest, sick or death benefits, or other pecuniary benefits or distributions, have ever been paid to any one, (R. 38).

8. Appellee's hospital is open to the public at large without distinction as to race, creed or color, and its equipment, services and facilities are adapted and available for the treatment of every kind of human illness, (R. 40).

9. Chapter VIII of the Corporation Act of 1850 (Stats. 1850, p. 374) authorizes appellee to take and hold property, real and personal, by gift or devise, and to take, hold and improve real and personal property and to erect hospitals and other buildings, (R. 40).

10. Without the gifts which appellee has received, and the income therefrom, appellee could not have acquired, improved or enlarged its present plant, nor afford the facilities which it furnishes, (R. 39).

11. There are fifteen directors, (R. 39).

12. The amount of the depreciation fund is $144,836.89, (R. 39).

13. Appellee's members are also entitled without charge, among other things, to medical and surgical care and consultations by a staff of physicians specially appointed therefor, who give consultations either at, or outside of, said hospital, and to special discounts (from ten to ninety per cent of prevailing prices) on drugs and dressings, X-Ray examinations and treatments, on diathermy, hydrotherapy, physiotherapy treatments, metabolism examinations, electrocardiograms, and in obstetrical cases, (R. 44).

14. Taxes for the period from January 1, 1937, to March 31, 1939, including those on employee's wages, and penalties, and interest, were entirely paid by appellee and were never reimbursed, (R. 46).

SUMMARY OF ARGUMENT.

I. The legislative history of the Social Security Act conclusively shows (a) that Congress considered hospitals "not operated for profit" to be "charitable" corporations, and (b) that it intended that such hospitals should be excluded from the operation of the Act.

In November 1943, Attorney-General Biddle advised the President (40 Op. A.G. No. 72) that this legislative history "clearly shows that the language of the exemption in the statute was adopted by the Congress

with knowledge that it had been construed to exclude nonprofit hospitals", and that Congress intended that "the exemption of the Social Security Act would receive the same construction." This opinion was rendered because of conflicting interpretations by the Social Security Board and the Bureau of Internal Revenue. Furthermore, the Committee reports show:

1. The Conference Committee report states, explicitly, that hospitals "not operated for profit" were to be exempt; and

2. The report of the House Committee on Ways and Means, and that of the Senate Committee on Finance, each states (a) that 9,389,000 "gainful workers" were to be excluded; (b) that among those so excluded were "institutional workers", (appellee is an "institution"), and (c) that such institutions as schools, colleges, the Y. M. C. A., and the like, should be exempt.

The question presented is of general importance. In this country, there are about seven thousand hospitals, ("Vital Statistics-Special Reports, Hospitals and other Institutional Facilities and Services, 1939", Vol. 13, No. 2, p. 7, published by the Bureau of the Census). They are there classified as "non-profit", (2,967), "government" (1,729) and "proprietary" (2,295). The "non-profit" group (much the largest—over forty-two per cent) is stated to embrace "church, fraternal or other association-controlled institutions".

Such "non-profit" hospitals are also of widespread public benefit. For example, the membership of rail-

road hospitals ("association-controlled institutions") probably exceeds half a million. These have long been held charitable, (*Union Pacific R. R. Co. v. Artist,* 8th Circ., 60 Fed. 365, a leading case).

II. But even were it doubtful whether or not Congress intended that non-profit hospitals should be excluded as charitable, appellant's argument proceeds upon too narrow a definition of "charity" and is contrary to the great weight of authority.

It is not the test of an institution's charitable character that it be "organized to receive and dispense charity". In its legal sense, "charity" is much more comprehensive than almsgiving. Any non-profit institution ministering to a fundamental human need (old age, education, sickness, or religious worship) is, per se, a "charity". It is misleading to assimilate such an institution to a "mutual benefit society", which pays benefits in money. The inherent distinction is between the care of the sick without a purpose to make a profit, (immemorially a charity), and the payment of benefits in money.

Even had Congress erred in its view that a non-profit hospital is a charitable institution, its intention and purpose would still control. However, such view is in entire harmony with the overwhelming weight of authority throughout the United States. The test is not whether a hospital's services are rendered without charge, but whether it is operated for private profit. The charitable character of a non-profit institution is not affected by making a charge to defray

cost of operation nor by restriction of benefits to members.

III. No part of appellee's net earnings has ever inured to the benefit of any private shareholder or individual. This is established by numerous authorities. In the court below, counsel for the United States, (Brief, p. 3), after reviewing plaintiff's organization and activities, stated that "therefore, it would follow that plaintiff has qualified itself under the last portion of the exemption quoted above, i.e.,

> 'the net earnings, no part of which inures to the benefit of any private shareholder or individual.' "

Hence, it becomes unnecessary to consider whether retroactive effect can be given to the Commissioner's reversal, on April 3, 1939, of his ruling of July 14, 1937. It was upon this latter ground (56 Cal. App. (2d) 534, 551-556; 133 Pac. (2d) 47, 55-59) that appellee recovered judgment for (a) employees' taxes which had accrued before the change in the State's ruling and (b) interest on such taxes and on the amount of employer's contributions theretofore accrued, all of which it had paid from its own funds.

There was a like ruling in *Garrison v. State,* 64 Cal. App. (2d) 820, 149 Pac. (2d) 711. *Waterbury Savings Bank v. Danaher,* 128 Conn. 78, 20 Atl. (2d) 455, treats the matter at length. (See also *Bull v. United States,* 295 U. S. 247, 79 L. Ed. 421, 55 S. Ct. 695; *Fromm Bros. v. United States,* 35 Fed Supp. 145, (Wisc. 1940).

Mertens Law of Federal Income Taxation, (1943), Vol. 10, Sec. 60.13, p. 636:

> "In several instances the Commissioner or the Collector has been held precluded from adopting a position inconsistent with one previously taken where injustice would result therefrom."

I.

THE HISTORY OF THE SOCIAL SECURITY ACT CONCLUSIVELY SHOWS THAT CONGRESS INTENDED THAT HOSPITALS "NOT OPERATED FOR PROFIT" SHOULD BE EXCLUDED FROM ITS OPERATION.

The Conference Committee report, while it amply supports the Attorney General's opinion, merely confirmed what previously appeared.

Sections 1426(b)(8) and 1607(c)(7) of the Internal Revenue Code, and the corresponding sections of the Social Security Act, were taken verbatim from previous fiscal statutes. The same language appears in the Revenue Act of 1916, if not before. Congress, in enacting the Social Security Act, understood that hospitals "not operated for profit" had always been held charitable corporations within the meaning of these sections and intended that this language should continue to have the same meaning.

The intention to exclude "hospitals not operated for profit" was expressly asserted when the Conferees were considering the amendments to the Bill. It was then declared that it was unnecessary to exclude such hospitals, in terms, for the reason that, by the settled

construction of the identical language in the income tax law, they were already within the definition of "charitable" corporations.

The record (Cong.Rec.,Vol.79, Part 10, pp.11,321 and 11,323, amendments Nos. 15 and 81) shows that, in the sections in question, the Senate had proposed the addition of "or hospital". In conference, however, as the statement of the Managers for the House appended to the Conference Report shows, the Senate receded, for the reason that the words "or hospital" were merely surplusage in view of the settled construction of identical language in the income tax act. Thus, it states:

> "The Senate amendment adds to the list of purposes 'or hospital' as a clarifying amendment. The Senate recedes, the conferees omitting this language as surplusage, based on the fact that the Internal Revenue Bureau has uniformly construed language in the income tax laws, identical with that found in the house bill, as exempting hospitals not operated for profit, and also on the fear that the insertion of the words added by the Senate amendment might interfere with the long-continued construction of the income tax law."

Language could not be clearer. The Managers for both the Senate and House intended that hospitals "not operated for profit" should not come within the Act. The only question was as to how this should be accomplished. To this end, the addition of "or hospital" had been proposed by the Senate, but merely as a "clarifying" amendment. Such "clarification",

however, was considered by the Conferees "surplusage", since the language of the House Bill, taken without change from the income tax law, had been "uniformly construed" as "exempting hospitals not operated for profit".

In other words, the Conferees intended, and understood, that, by virtue of the language of the Social Security Act, a non-profit hospital was not liable for the tax, and that it was unnecessary to state this in terms, because it was already established as a result of the settled construction of "identical" language in the income tax law.

Furthermore, the reports of the House Committee on Ways and Means, and of the Senate Committee on Finance, (H.Rep. No.615, Sen.Rep. No.628), each declare that:

1. Over one-fourth of all employees in eligible occupations (that is, 9,389,000 workers) were intentionally excluded from the operation of the Act;

2. Employees of "institutions" were so excluded;

3. Churches, schools and other non-profit educational "institutions", the Y. M. C. A., and other organizations exempt under Section 103(6) of Revenue Act of 1932, (Sec. 101(6) of Revenue Act of 1934), were excluded;

4. The "use to which the income is applied" was "the ultimate test of the exclusion" of charitable corporations, rather than the "source" from which such income is derived.

Thus, in each report (H.Rep. p.15, Sen.Rep. p.27) there appears:

"Total number of gainful workers	48,830,000
Total number of owners, operators, self-employed (including the professions)	12,087,000
Total of workers excluded because of occupation (farm labor, domestics, teachers, and governmental and institutional workers)	9,389,000
Total number of workers in eligible occupations	27,354,000"

"Institution" is defined (Webster's New Int. Dict.) as "an established or organized society or corporation", "an establishment, especially one of a public character or one affecting a community". In *Estate of Sutro,* 155 Cal. 727, 735, the court quotes the following language from *In re Shattuck's Will,* 193 N.Y. 446, 86 N.E. 455:

> "An 'institution' is an established or organized society or corporation. It may be private in its character, designed for profit to those composing the organization, or public and charitable in its purposes. An institution is a mere organism for the accomplishment of an object. * * * The use of the word 'institution' does not point to a public, as distinguished from a private, organization."

Not only, however, did each committee report indicate that "institutional workers" were to be excluded,

but in each there twice appears (H.Rep. pp.22, 33, Sen.Rep. pp. 33, 45) an explanation of "charitable", all four being virtually identical. Thus, (H.Rep. p.33):

> "Services performed in the employ of religious, charitable, scientific, literary, or educational institutions, no part of the net earnings of which inures to the benefit of any private shareholder or individual, are also exempt from the tax imposed by this title. For the purpose of determining whether such an organization is exempt, the use to which the net income is applied is the ultimate test of the exemption rather than the source from which the income is derived. For instance, if a church owns an apartment building from which it derives income which is devoted to religious, charitable, educational or scientific purposes, it will not be denied the exemption. The organizations which will be exempt from such taxes are churches, schools, colleges, and other educational institutions not operated for private profit, the Y. M. C. A., the Y. W. C. A., the Y. M. H. A., the Salvation Army, and other organizations which are exempt from income tax under section 101 (6) of the Revenue Act of 1932."

The test there indicated, that it is the "use" to which the income is applied, rather than the "source" from which it is derived, is the same as that announced in *Trinidad v. Sagrada Orden,* 263 U. S. 578; 44 S. Ct. 204, 68 L. Ed. 458, (infra. p. 23.)

Congress has treated all hospitals "not operated for profit" alike. The exclusion was not of "free", or "purely charitable", or "non-member", hospitals.

"Fraternal or other association controlled institutions" are not denied the benefit of the exemption. The only test is whether the hospital is "operated for profit". The Commissioner's letter to appellee of February 24, 1939, (R. 45-46), states that "it appears you are not operated for profit".

Doubtless Congress knew that scarcely any hospitals are wholly "free". Thus, in this state, even county and municipal hospitals do not give "free" service when patients can pay any part of the cost.*

We submit, therefore, that appellee, both as a hospital "not operated for profiit" and as a non-profit "institution", is exempt. Its employees are among the 9,389,000 workers who are to be excluded. The intention of Congress appears beyond doubt.

II.

BY THE GREAT WEIGHT OF AUTHORITY THROUGHOUT THE UNITED STATES, APPELLEE, AS A NON-PROFIT HOSPITAL, IS A CHARITABLE INSTITUTION.

That non-profit hospitals are charitable has long been settled. The opinion of the trial judge cites merely a few of the decisions, (R. 36). Since the intention and purpose of Congress are not doubtful, extended discussion of this point seems unnecessary. We will set forth the controlling principles, the au-

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Welf. & Inst. Code, Sec. 204; *Goodall v. Brite*, 11 Cal. App. (2d) 540, 54 Pac. (2d) 510, hearing in Supreme Court denied; *Reichle v. Hazie*, 22 Cal. App. (2d) 543, 71 Pac. (2d) 849, hearing in Supreme Court denied.

thorities in support of which mainly appear in the appendix.

1. "Charity" is not limited to "almsgiving" nor to gifts to the poor, but its legal meaning is far more comprehensive. Nor is it limited to any narrow or stated formula, but "is as varying as the wants of humanity", expanding with the advancement of civilization and the increase of human needs. (Appen. A, p. i.)

2. "Charity" represents "both a personal and a social endeavor to ameliorate the conditions which exist in society", (*Enc. Brit.,* 14th (1936) Ed., Vol. 5, p. 248). "It has no necessary relation to relief or alms. It may mean a consideration shown for the welfare of others either individually or generally", (Id.), and "the Christian maxim rightly understood, 'loving one's neighbor as oneself', sets the standard of charity", (Id. p. 249).

Ould v. Washington Hospital, 95 U. S. 303, 311, declares that a charitable use refers to "almost anything that tends to promote the well-doing and well-being of social man". Thus, a non-profit hospital, though not confined to the poor, is a public charity, (*Buchanan v. Kennard,* 234 Mo. 117, 139, 136 S. W. 415, Ann. Cas. 1914D 50).

In 3 *Paul & Mertens on Federal Income Taxation,* p. 582, Sec. 32.19, "charity" is defined as "a gift, act or service for the benefit of an indefinite number of persons."

Restatement, Trusts, Sec. 368:

"Charitable purposes include

(a) the relief of poverty;

(b) the advancement of education;

(c) the advancement of religion;

(d) the promotion of health;

(e) government or municipal purposes;

(f) other purposes the accomplishment of which is beneficial to the community."

Accord:

Pennsylvania Co. v. Helvering, 66 Fed. (2d) 284, (Ct. App. Dist. Col.)

Stuart v. City of Easton, 3rd Circ., 74 Fed. 854,

Ettlinger v. Trustees of Randolph-Macon College, 4th Circ., 31 Fed. (2d) 869,

Long v. Rosedale Cemetery, 84 Fed. 134, 136,

Harrison v. Barker Annuity Fund, 7th Circ., 98 Fed. (2d) 286,

Darcy v. O'Brien, 65 Fed. (2d) 599, (Ct. App. Dist. Col.)

Gossett v. Swinney, 8th Circ., 53 Fed. (2d) 772, 776,

Todd v. Citizens' Gas Co., 7th Circ., 46 Fed. (2d) 855,

Union & New Haven Trust Co. v. Eaton, 20 Fed. (2d) 419, 421, (D. C. Conn.)

International Reform Ass'n. v. District Unemployment Compensation Board, 131 Fed. (2d) 337, (Ct. App. Dist. Col.)

Santa Fe Lodge No. 460 B. P. O. E. v. Employment Security Commission, 159 Pac. (2d) 312, (New Mex., May 1945).

Appellee, with its present equipment and facilities, is the result of the acts of its founders in establishing it, of its members in continuing to maintain it, and of the gifts and legacies it has received, so that there now exists an institution whose membership is unlimited, which "tends to promote the well-doing and well-being" of the community as a whole. The test of appellee's charitable character is whether it acts for profit, and the benefit derived by the community from its activities.

3. By the overwhelming weight of authority throughout the United States, a non-profit hospital is, per se, a charitable institution. (Append. B, p. ii.)

4. The test of a charity is to be found in the purpose for which the institution is founded and exists. The motive of, or benefit to, donor or settlor is immaterial. (Append. C, p. v.)

Whatever may have been the expectations or motives of appellee's members as they may be from time to time, there has come into existence, largely from donations and bequests, an institution which, without profit and at a charge of less than half its actual outlay, not only affords complete protection to the health of nearly ten thousand persons, but also stands ready similarly to care for all others complying with its simple and non-exclusive requirements for admission.

5. That a non-profit institution makes a charge against members, or that its inmates pay a consideration on their admission, or that a non-profit school or hospital makes a charge to defray the cost of its operation, does not affect the charitable character of such institution. (Append. D, p. vi.)

6. The restriction of benefits to its own members does not affect an institution's charitable character. Especially is this true where the membership is very large and new members are accepted. (Append. E, p. vii.)

If these principles establish appellee to be a charitable institution, it cannot be material whether a "mutual benefit society" also is charitable.

The distinction between non-profit hospitals and mutual benefit societies.

Zollmann on Charities, p. 188:

"A hospital association not conducted for profit, which devotes all its funds, including those received from patients, exclusively to the maintenance and improvement of the institution is, therefore, a charity in every sense of the word and has been recognized as such by numerous cases".

Bogert on Trusts, Vol. 2, pp. 1123-24:

"A trust to pay money to members or their relatives, regardless of their need or of the effect of the trust upon the recipients, cannot be charitable. The trust must be to aid members or others who are in want, sickness, or in other condition where they can receive charitable benefits. A few

cases which have denied that trusts for the members of such societies are charitable can be explained on this ground. They were merely trusts to give pecuniary advantages to members or their nominees. They were organizations for social and savings purposes, with no necessary element of the relief of poverty or distress."

Scott on Trusts, (1939), Vol. 3, Sec. 372.1, p. 1997:

"An institution to promote health, however, is charitable although it is a private institution, provided that it is not one the profits of which inure to the benefit of any individual".

Id. Sec. 372.2, p. 1998:

"A trust for the promotion of health may be charitable although the persons to receive the benefits are of a limited class, if the class is not so small that the purpose is not of benefit to the community. Thus a trust to establish a hospital for the employees of a particular railroad is upheld as charitable."

Id. Sec. 376, pp. 2032-33:

"A trust to establish or maintain an institution may be charitable, however, although it is provided that some or all of the persons to receive benefits from the institution are to pay fees or otherwise contribute to the expense of maintaining the institution. It has been so held in numerous cases of educational institutions and hospitals and homes. The question is not whether the institution may receive a profit, but what disposition is to be made of the profit, if any, which may be received."

14 *Corp. Jur. Secun.* p. 419:

"Voluntary, unincorporated associations, organized to promote some purpose beneficial to the general public or of certain classes thereof are charitable societies or institutions and are subject to the rules applicable to such societies. In so far as a benevolent association has for its object the conferring of benefits without requiring an equivalent from the one benefited, it may be a charity".

We submit, therefore, that it is immaterial whether a non-profit hospital resembles in any respect a mutual benefit society,* and that appelle is a charitable corporation.

III.

NO PART OF APPELLEE'S NET EARNINGS HAS EVER INURED TO THE BENEFIT OF ANY PRIVATE SHAREHOLDER OR INDIVIDUAL.

The authorities to this effect are numerous. We will first show that, in fact, no part of appellee's net earnings has ever so inured.

1. Congress has itself construed the clause, "no part of the net earnings of which * * *", as embracing hospitals "not operated for profit". This follows (a) from the statement in the Conference report that the Internal Revenue Bureau had "uniformly con-

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*Some authorities, however, have held such societies to be charitable, (*Pease v. Pattinson*, L. R. 32 Ch. Div. 154; 55 L. J. Ch. N.S. 617, 54 L.T.N.S. 209; *Spiller v. Maude*, L. R. 32 Ch. Div. 158, 11 L.T.N.S. 399; *In re Buck*, (1896) 2 Ch. 727).

strued ["identical"] language in the income tax laws as exempting hospitals not operated for profit", and (b) from the declared intention of Congress that the same language in the Social Security Act should have the same meaning. In other words, Congress considered that the net earnings of a non-profit non-stock hospital do not inure to private gain.

2. The destination of the income, and not its source, governs.

3. "Net earnings" refers to the corporation's earnings as a whole. The statute does not treat it as departmentalized nor as divided into independent income-producing units.

4. Under the rules of *ejusdem generis* and *noscitur a sociis,* "individual", in the phrase "any private shareholder or individual", means one having a proprietary or pecuniary interest peculiar to himself. It contemplates operations for profit, but forbids that such profits should inure to any "private" shareholder or individual. Hence, to defeat the exemption, net earnings must inure to the "private" advantage of one or more of the group, as distinguished from the benefits to the group generally. The right of appellee's members is to be cared for in sickness, but not to its earnings or to any other asset. This is not a property right, but only usufructuary. It is "merely the right to the use thereof as long as he continues to be a member", (10 Corp.Jur. Secun. 297).

5. The income tax law affords an analogy. "Income" derived from property must be something

"severed" from "capital" and received or drawn by the recipient for his separate use, benefit and disposal. (*Eisner v. Macomber,* 252 U.S. 189, 40 Sup. Ct. 189). Similarly, "net earnings" do not "inure" to the benefit of a "private shareholder or individual" until they are first "severed" from the general fund so as thereby to afford to such person a benefit special and peculiar to him. The distinction indicated by the clause, "no part of the net earnings of which inures to the benefit of any private shareholder or individual", is between (a) assets retained by the institution in its organized capacity, and (b) persons privately and individually benefited. As long, however, as unsevered net earnings are held as a part of the fund for the benefit of the whole group, (here, one having a very large and an unlimited membership), so as to promote those socially beneficial purposes which are the basis for the exemption, there is no "private" advantage to any single member of that group.

"Exclusively" in the clause, "organized and operated exclusively", modifies "organized and operated". It refers to the "purpose" of the institution. The rendering of services gratuitously is not the test of an institution's "purpose". The act does not say "exclusively charitable".

The clause, "no part of the net earnings * * *", is the equivalent of "non-profit". As said in *Mertens, Law of Federal Income Taxation,* Vol. 10, Sec. 60.13,

p. 636, it is "independent of the other tests, it operates regardless of the fact that the purposes may be religious, educational or literary."

The section specifies five "purposes", viz.: "religious, charitable, scientific, literary and educational". A school may be operated for profit, and yet be exclusively "educational", (*Kemper Military School v. Crutchley,* 274 Fed. 275). A society of book lovers is "literary", or one of scientists is "scientific", though their facilities are not free to the general public, (*United States v. Proprietors of Social Law Library,* 1st Circ., 102 Fed. (2d) 481). A church congregation is "religious", though its benefits are reserved primarily to its paying members, (*Estate of Lubin,* 186 Cal. 326).

A charitable "purpose" (e.g., the treatment of the sick without profit) is not altered by the receipt of rents or other income or by payments by non-member patients. "Such activities are mediate to the primary purpose", (L. Hand, J., in *Slee v. Commissioner,* 2nd Circ., 42 Fed. (2d) 184).

By using income from its surplus facilities (receipts from non-member patients) to reduce its overhead and to afford an unlimited membership better service and at lower rates, a non-profit institution—whose purpose is the relief of the sick and whose funds and revenues are devoted exclusively to that purpose—does not alter its character as a hospital "not operated for profit", but thereby furthers that primary purpose which the exemption seeks to foster.

The operation of a non-profit hospital, whose services are available to all, is itself a charitable purpose. Such receipts do not inure to any "private" shareholder or individual.

The Authorities.

Trinidad v. Sagrada Orden de Predicadores, 263 U.S. 581, 68 L.Ed. 458, 44 S. Ct. 204.

Corporation sole, representing a religious order, received income by way of rents, interest, dividends, and profits on small quantities of supplies sold to its agencies. The language of the statute was identical to that here involved. Held, exempt.

> "Whether the contention is well taken turns primarily on the meaning of the excepting clause, before quoted from the taxing act. Two matters apparent on the face of the clause go far towards settling its meaning. First, it recognizes that a corporation may be organized and operated exclusively for religious, charitable, scientific or educational purposes, and yet have a net income. Next, it says nothing about the source of the income, but makes the destination the ultimate test of exemption.
>
> "Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain. Such activities cannot be carried on without money; and it is common knowledge that they are largely carried on with income received from properties dedicated to their pursuit."

At page 582:

"In using the properties to produce the income, it therefore is adhering to and advancing those purposes, and not stepping aside from them or engaging in a business pursuit."

"Financial gain is not the end to which they are directed."

Id.

Commissioner of Internal Revenue v. Kensico Cemetery, 2nd Circ., 96 Fed. (2d) 594, 596

Membership cemetery corporation deriving profits from the sale of burial plots and incidental services, which were devoted to the payment of its debts and to cemetery's maintenance and improvement, held, exempt.

"The argument that net earnings may be distributed not in cash but in intangible values as the improvement of the remaining lots (by the embellishment of the cemetery) is without merit. While the improvements might enhance the value of the unsold lots and increase the prices received therefor to the advantage of the land certificate holders, still, one of the purposes which justifies the exemption of a cemetery is such acquisition, improvements and embellishment of burial grounds. * * * Here the cemetery's revenues resulted from and were devoted to the purposes for which the statute desires them to be exempt and this applies not only to revenues immediately applied to maintenance and improvement of the burial grounds, but to the revenues accumulated for such purposes. The cemetery is devoted to a public

purpose which the tax law aims to protect and it is not operated for profit. *Trinidad v. Sagrada,* 263 U.S. 578, 44 S. Ct. 204, 68 L. Ed. 458. The respondent is owned and operated exclusively for the benefit of its members and therefore is exempt."

Roche's Beach, Inc. v. Commissioner of Internal Revenue, 2d Cir., 96 Fed. (2d) 776, 779

Corporation organized by testator to operate his property and to pay income to testamentary charitable foundation, exempt from income tax as corporation organized and operated exclusively for charitable purposes.

"No reason is apparent to us why Congress should wish to deny exemption to a corporation organized and operated exclusively to feed a charitable purpose when it undoubtedly grants it if the corporation itself administers the charity. We think the language is adequate to describe both types."

United States v. Proprietors of Social Law Library, 1st Circ., 102 Fed. (2d) 481, 484

The Social Law Library was incorporated by special act. Its facilities were open to all citizens of Boston willing to aid in its upkeep by becoming a "proprietor" or "subscriber", and were also free of charge to certain State and Federal officials. Held, charitable.

"The contention of the government that the net earnings of the Social Law Library inure to the benefit of the shareholders or individuals, be-

cause any improvements of the Library rendering it more serviceable to its members is of special benefit to them; but though every improvement in a charitable institution confers additional benefits on those using it, or availing themselves of its benefits, such benefits have never been considered as taking the institution out of the class of charitable institutions because it has enabled it to do better educational, literary or charitable work, or because it resulted in distributing its benefits among private shareholders or individuals."

Commissioner v. Chicago Graphic Arts Federation, 7th Cir., 128 Fed. (2d) 444.

"Any business in which respondent had engaged of a kind ordinarily carried on was only incidental or subordinate to its main or principal purpose."

Santee Club v. White, 5th Cir., 87 Fed. (2d) 5, 7

Recreation club not taxable on profits realized on sale of small unusable portion of its property, profits inuring to members through use of club's facilities not being "benefit" within meaning of income tax law.

"No part of the profit on the sale of real estate in question inured to the benefit of the Club's shareholders except through their use of the Club facilities, which is clearly not the benefit referred to in the exempting clause of the statute."

Koon Kreek Klub v. Thomas, 5th Circ., 108 Fed. (2d) 616, 618

Club leased grazing privileges on its game preserve, also granted oil lease on its entire property for present cash consideration and annual renewal rental. Proceeds used to pay off mortgage on property. Held, exempt.

> "The exemption applies to profits so long as they are retained by the organization or used to further the purposes which are made the basis of the exemption, and are not otherwise used for the benefit of any private shareholder."

There was a like ruling, under similar circumstances, in *Scofield v. Corpus Christi Golf & Country Club,* 5th Circ., 127 Fed. (2d) 452.

Crooks v. Kansas City Hay Dealers' Ass'n., 8th Circ., 37 Fed. (2d) 83, 87

That, on final dissolution, accumulated profits would go to individual members, does not defeat exemption.

> "If the Association were organized for profit that ultimate possible division of a surplus might be sufficient to justify the exclusion of the Association from the exempted class. Such a remote contingency, however, in my judgment, with an association not organized for profit, was not intended to destroy the privilege of exemption." (Quoted from trial judge's opinion.)

Oklahoma State Fair and Exposition v. Jones, (D.C.Okla.) 44 Fed.Supp. 630 (1942)

Receipts from vaudeville, rodeo and other shows held not to defeat plaintiff's exemption as an exclusively educational and scientific institution:

"The case would seem to turn upon the construction of the word 'exclusively' in the light of the facts developed. Plaintiff relies strongly upon the principle promulgated in Trinidad v. Sagrada Orden, 263 U.S. 578, 44 S. Ct. 204, 68 L.Ed. 458. * * *

"*Roche's Beach v. Commissioner,* 2 Cir. 96 Fed. (2d), 776, is cited as a case of similar construction where the term 'exclusively' was used in defining tax liability. * * * In both of the foregoing cases it was held that the greater emphasis should be placed upon the destination of the income for construction purposes.

"Some of the other cases cited are *Sand Springs Home v. Commissioner,* 6 B. T. A. 198; Koon Kreek Klub v. Thomas, Collector, 5 Cir., 108 F. (2d) 616, which also adhere to the same line of reasoning."

City Club of Milwaukee v. United States, (D.C. Wisc.) 46 Fed. Supp. 673 (1942)

Nonstock nonprofit corporation, formed for the study of municipal affairs, the acquisition and dissemination of accurate information concerning them, and generally to promote better social, civic and economic conditions, operated a restaurant, candy and cigar counter, for members' convenience, and a small profit was made each year from the operation of a candy and cigar counter. *Held,* plaintiff entitled to recover Social Security taxes and that exempting clause should be

"given a liberal construction so that the purposes of the provision to favor and encourage such organization is carried out."

See also *Linderman v. Driscoll,* 26 Fed.Supp. 565, (D.C.Pa.)

Anderson Country Club, Inc., 2 T.C. 1238

Taxpayer's golf course and club house had been located on leased land. Upon expiration of lease it became necessary to buy lessor's entire tract, including some acreage unsuitable for golf course. Taxpayer, being unable to sell this unusual acreage as a whole, it was sold in small tracts over a period of years, at considerably in excess of cost. *Held,* excess did not inure to benefit of members as private gain.

> "The respondent's regulations recognize the fact that an incidental sale of property does not extinguish the right to an exemption. Considering 'incidental' in its ordinary sense to mean collateral or subordinate to the principal purpose, we think there is ample evidence that the sales in question were incidental to the primary reason for the club's existence."

Unity School, 4 B. T. A. 61

A corporation, otherwise exempt from taxation, does not lose exemption because it carries on profitable or competitive activities in furtherance of its predominant purpose. Opinion rejects claim that there were "several departments" of corporation, each of which were to be separately considered:

> "The inquiry must always be whether all the activities of the organization are devoted to furthering its predominant religious, charitable, scientific or educational purpose. * * * If these purposes or any of them are the controlling reasons for the corporation's existence and all things

> are devoted by it to that end, the Congressional purpose of exemption, 'made in recognition of the benefit which the public derives', should not be defeated because its incidental features are to some extent profitable."

This case was followed in *Forest Lawn Memorial Park Ass'n.,* 45 B. T. A. 1091, 1103, which also cites the *Kensico Cemtery* case.

District of Columbia v. Mt. Vernon Seminary, 100 Fed. (2d) 116, 118, (Ct.App.D.Col., 1938)

An act exempted from taxation "property used for educational purposes that is not used for private gain". Plaintiff's property was all used for educational purposes. No excess of receipts over expenditures had gone to incorporators or to any contributor to endowment.

> "The term 'private gain' as used in the statute, has reference only to gain realized by any individual or stockholder who has a pecuniary interest in the corporation and not, as appellant contends, to profits realized by the institution but turned back into the treasury or expended for permanent improvements. See Commonwealth v. Trustees Hamilton College, 125 Ky. 329, 101 S.W. 405. It is the evident intention of the statute to exempt all institutions, educational in nature, which are not commercial in their purpose.
>
> "Congress has recognized the fundamental difference between income earned by an educational institution which is diverted into private use, and similar income which is dedicated to the continued improvement of the institution. The latter

is a highly desirable use from the public point of view and equally worthy of tax exemption as the property out of which the income was produced."

King County Insurance Association, 37 B. T. A. 288, 292 (1938).

Membership of trade association was composed of agents of various insurance companies. To help meet its overhead expenses, members turned over to it business of writing policies upon certain public risks, thereby reducing their dues. *Held,* no part of such earnings inured to their benefit.

"The evidence shows, too, that no part of the net earnings ever inured to the benefit of any private individual. The income from the public business, as above stated, merely served to reduce the amount of the dues. No member ever received, ever expected to receive, or ever had any possibility of receiving, back from the petitioner in any year an amount greater than or even equal to his advances to the petitioner for such year."

Waynesboro Manufacturing Ass'n., 1 B. T. A. 911, 914

Non profit corporation, which held contracts with coal mining companies giving it election to purchase coal at specified price, and which resold to its members and others at a small profit, held exempt:

"It had earnings, but the Supreme Court in the Trinidad case clearly said that Congress contemplated this and that net income does not take the organization out of the statute. We think the taxpayer is a business league not organized for profit. * * *

"Actual distribution to any individual defeats the exemption. Here, however, the Commissioner agrees that the taxpayer retained for its own use its earnings. No part thereof inured to the benefit of any individual. Thus the statutory qualifications are fully met."

We submit, therefore, that none of appellee's net earnings have ever inured to the benefit of any private shareholder or individual.

IV.

THE AUTHORITIES CITED BY APPELLANT.

Zollmann on Charities, pp. 143-144:

The inapplicability of this has been shown, (supra, p. 17).

Employees Benefit Association v. Commissioner, 14 B. T. A. 1166

Members' dues held to be taxable income.

Philadelphia & Reading Relief Ass'n., 4 B. T. A. 713, 728

"The Association agrees to pay a definite sum in the cases specified."

Pontiac Employees Mutual Benefit Ass'n. v. Commissioner, 15 B. T. A. 74

Follows preceding case.

Coe v. Washington Mills, 149 Mass. 543, 21 N.E. 966

Voluntary association of employees, who paid weekly contributions. Sick members were paid a weekly allowance.

In re Kennedy's Estate, 269 N. Y. Supp. 136,

Bequest to nurses' alumnae association formed to promote social intercourse. Compared by court to mutual benevolent association. Charitable aid to distressed members merely incidental to main purpose.

In the next three cases, the corporation was held to be an adjunct or instrumentality for the benefit of private institutions for profit.

Northwestern Municipal Ass'n. v. United States, 99 Fed. (2d) 460, 463

Association formed by and as instrumentality of group of banks and investment firms, held, not a "civic league" but "mere adjunct" for its founders' benefit, any public benefit being "incidental".

Uniform Printing & S. Co. v. Commissioner, 33 Fed. (2d) 445

Taxpayer was organized by insurance companies to do their printing and furnish them supplies at actual cost. Prices later raised to cover expected expenditures for improvements and additions. Held, that taxpayer was not a "business league" and that profits thus realized were taxable income.

Northwestern Jobbers' Credit Bureau v. Commissioner, 8th Circ., 37 Fed. 880

Taxpayer's activities included "lines of work ordinarily performed by mercantile agencies, trust companies, attorneys at law, credit men and collection agencies", (p. 882), all of which were "valuable and reasonably necessary to the proper conduct" of its shareholders' business, (p. 883).

Donnelly v. Boston Catholic Cemetery Ass'n., 146 Mass., 166, 15 N. E. 505

holds defendant to be subject to "ordinary civil liabilities" for allowing an unauthorized interment in plaintiff's plot.

Hassett v. Associated Hospital Service Corporation, 125 Fed. (2d) 611, did not involve a hospital of any kind. It seeks to distinguish *United States v. Proprietors of Social Law Library,* 102 Fed. (2d) 481, and is fully considered in the trial judge's opinion (R. 34-35), which states:

> "Plaintiff has all the attributes of the Social Law Library which are mentioned as points of distinction between the Library case and Hassett case."

The opinion (R. 35) also considers *In re Farmers' Union Hospital Ass'n. of Elk City,* 190 Okla., 661, 126 Pac. (2d) 244.

La Societe Francaise v. California Employment Commission, 56 Cal. App. (2d) 534, 133 Pac. (2d) 47.

After stating (p. 542) that "charity", when used in a statute, "must be defined in conformity with the purpose or intention of the lawmakers", the court declared:

> "We are unable to agree with appellant as to the view, purpose and intent of Congress, that hospitals not operated for profit are charitable institutions."

This singular result was reached without any reference to or discussion of the legislative history of the Social Security Act, which had been strongly urged in the briefs,* but which the opinion pointedly ignored. The opinion follows the *Hassett* case.

The opinion (p. 542) announces the test, that "the hospital is operated for no other purpose than that of dispensing charity". This is contrary to all the authorities, including the later California case of *Scripps Memorial Hospital v. California Employment Commission,* 24 Cal. (2d) 669, 151 Pac. (2d) 109.

Moreover, while the court (p. 542) declared that the briefs contained "very little comment" on the "exact language" of the State Act—identical with that of the Federal Act—it similarly ignored the numerous decisions** establishing the meaning of the clause, "no part of the net earnings * * *".

The language of the same court (*Carpenter v. City of Santa Monica,* 63 Cal. App. (2d) 772, 147 Pac. (2d) 964, 971), is, therefore, directly applicable:

> "It is elementary, of course, that a decision which fails to consider a point of law cannot be considered an authority on that point." (citing cases)

Smith v. Reynolds, 43 Fed. Supp. 510.

This case (a) fails to consider the history of the Social Security Act, (b) is contrary to *Union Pacific Ry. Co. v. Artist,* 60 Fed. 365, decided in the Circuit

*At pp. 47-54 of the Opening Brief in that case, (supra, pp. 8-12).

**At pp. 179-189 of said Opening Brief, (supra, pp. 23-32).

of which Minnesota is a part, (c) ignores numerous decisions holding railroad and like hospitals to be charitable, and (d) disregards the distinction between the treatment of the sick and payment of benefits in money. There was no appeal.

However, appellee comes within its definition of "charitable", (p. 513):

> "A charitable institution is one established maintained and operated for the purpose of taking care of the sick, without any profit or view of profit, but at a loss which has to be made up by benevolent contributions".

But for the gifts and donations received by appellee, it could not have acquired, nor now maintain, its present hospital and plant nor afford the facilities which it furnishes, since monthly dues and admission fees would have been insufficient, (R. 39).

The opinion (p. 513) states:

> "The member is entitled to the benefits as a matter of right, so long as he pays the dues required of him. But if he should fail to pay the monthly assessment or dues, his membership in the Association is automatically forfeited, along with any rights to the benefits provided for in the by-laws."

This is not here true, (supra p. 2.)

The test cannot be that, upon payment of dues, a member is "entitled" to benefits as a matter of "right". That a non-profit school, hospital or home makes a charge against pupils, patients, or inmates to

help defray the cost of its operation, does not affect its charitable character, (supra p. 17), notwithstanding that such persons acquire enforceable rights. "The income thus derived is used only to maintain the institution", (*Estate of Henderson,* 17 Cal. (2d) 853, 868, 112 Pac. (2d) 605).

Thus, though the pupil in *Estate of Bailey,* 19 Cal. App. (2d) 135, 65 Pac. (2d) 102, or the inmate (*Henderson* case) who assigned his assets to the Home, doubtless acquired "rights", the school or the Home was a charity. Here, such "right" is merely one to treatment, (supra p. 20).

> *Morrow v. Smith,* 145 Iowa, 514, 124 N. W. 319
> "The only measure of his right is the pressure of his need. This is the domain and the function of charity as commonly understood".

> *Union Pacific Railway Co. v. Artist,* 8th Circ., 60 Fed. 365,
> "Any one of these employees could compel application of this fund to the purposes for which it was collected".

In *Lutheran Hospital Ass'n. v. Baker,* 40 S. D. 226, 167 N. W. 148, and *German Hospital v. Board of Review,* 233 Ill. 246, 84 N. E. 215, (hospital held charitable), payment of contributions entitled the payors to a corresponding credit on hospital bills.

Hence, we submit, the acquisition of "rights" by a pupil, patient or inmate is not the test of charitable character.

Nor can such test be the time or manner of payment, that is, whether such person (a) makes a single payment in advance, or (b) later pays in installments. Appellee cannot, at the same time, be both charitable and non-charitable, that is, charitable as to prepaying life members, and non-charitable as to those paying monthly dues.

We submit, therefore, that in the case of a non-profit institution of widespread social value ministering to a fundamental human need, the test of its "charitable" character is not whether a member acquires enforcible "rights" nor the fact, time or manner of payment.

CONCLUSION.

In conclusion, we submit:

Appellee is a non-profit charitable institution (a) founded, by donations, to treat the destitute sick; (b) whose only activity is the operation of a non-profit hospital; (c) whose plant and facilities have been largely acquired by testamentary and other gifts, and which has received, in times of stress, other public support, (R. 169-172); (d) which is maintained, but only in part, by members' dues and admission fees; (e) whose membership is unlimited, which receives new members, and whose requirements for admission are simple and non-exclusive; (f) which seeks to treat as many of the sick as it can, to give them adequate and complete treatment, and for the lowest amount it

can charge, all of which it does, not for profit, but to benefit a large and indefinite part of the community; (g) which has set up a relief fund to pay the dues of needy members, to whom it also furnishes, without charge, such additional facilities as may be required; (h) maintains an Old People's Home for elderly members, to which they are admitted either without charge or on a non-profit basis, and (i) renders to the public at large other forms of gratuitous relief.

Appellee protects the health of nearly ten thousand persons, the great majority of whom must be of moderate means, and many of whom, in case of serious illness, would otherwise have to be cared for by the public. By early consultations and treatment, it forestalls what might develop into serious illnesses, and thereby aids in diminishing members' unemployment and the suffering and privation to members and others resulting therefrom. For nearly a century, it has rendered services of wide-spread public benefit. In case of war or public calamity, its facilities are available.

Appellee could not give entirely free service. Donations are uncertain, both in time and amount. It very early appeared that it could continue its activities only through members' regular contributions, which, however, have been kept as low as possible.

The regular and hard-earned contributions of the poor are as deserving as the bounty of the rich. Only a spirit of solidarity and of mutual helpfulness has enabled this large group to endure. Selfish motives of gain never would have been sufficient. The purpose to

join with one's fellow-creatures in an effort to relieve against a common affliction of mankind is not one to make a gain, nor can more effective application be given to the precept, "All things whatsoever Ye would that men should do to you, do you even so to them; for this is the law and the prophets."

Appellee's reserves, carefully husbanded for the purpose of keeping pace with needed improvements and advancements in medical science, would be endangered, were it to be held that in the operation of its hospital it is on a parity with those whose activities are conducted for profit. Money needed for improvements would be used to pay taxes. The imposition of the tax upon appellee is subversive of the public policy expressed in the legislation here involved, for the exclusion of hospitals "not operated for profit" does not grant a special privilege but recognizes that they are indeed public institutions rendering a service of benefit to the entire community.

It is respectfully submitted that the judgment appealed from should be affirmed.

Dated, San Francisco, California,
October 8, 1945.

Respectfully submitted,
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(Appendices A, B, C, D and E Follow.)

Appendices A, B, C, D and E.

Appendix A

"Charity" is not limited to "almsgiving" nor to gifts to the poor, but its legal meaning is far more comprehensive.

Bogert on Trusts, Vol. 2, pp. 1163-4;
Gossett v. Swinney, 53 Fed. (2d) 772, 776;
Old Colony Trust Co. v. Welch, 25 Fed. Supp. 45, 58 (D.C.D. Mass. 1938);
Harrison v. Barker Annuity Fund, 98 Fed. (2d) 286 (C.C.A. 7th);
Darcey v. O'Brien, 65 Fed. (2d) 599 (Ct.App. Dist.Col.);
Powers v. Massachusetts Homeopathic Hospital, 101 Fed. 896 (Cir.Ct.Mass.);
14 *Corp. Jur. Secun.* 411;
Wilson v. First National Bank, 164 Ia. 402, 145 N.W. 948;
Donohugh's App., 86 Pa. 312;
Buchanan v. Kennard, 234 Mo. 117, 136 S.W. 415, Ann. Cas. 1912 D, 50;
People v. Morton, 373 Ill. 72, 25 N.E. (2d), 504;
State v. Board of Control, 85 Minn. 165, 88 N.W. 533;
5 *Cal. Jur.* 2-3;
Estate of Henderson, 17 Cal. (2d) 853, 857;
People v. Cogswell, 113 Cal. 129, 137;
Collier v. Lindley, 203 Cal. 641, 648;
Dingwell v. Seymour, 91 Cal. App. 483, 498;
International Reform Fed. v. Dist. Unemployment Comp. Board, 131 Fed. (2d) 337.

Appendix B

AUTHORITIES HOLDING NON-PROFIT HOSPITALS TO BE PER SE CHARITABLE INSTITUTIONS.

Buchanan v. Kennard, 234 Mo. 117, 139, 136 S.W. 415, Ann. Cas. 1912D 50.

In re Mendelsohn, 262 App. Div. 605, 31 N.Y.S. (2d) 435, 440 (social security tax).

Commissioner of Internal Revenue v. Battlecreek Inc., 126 Fed. (2d) 405, (income tax).

In re Rust's Estate, 168 Wash. 344, 12 Pac. (2d) 396, 398 (1932), (Exemption from taxation).

New England Sanitarium v. Inhabitants of Stoneham, 205 Mass. 335, 91 N.E. 385, 387, (1910), (Exemption from taxation).

People v. Sexton, 267 App. Div. 736, 48 N.Y. Supp. (2d) 201 (exemption from taxation).

Scripps Memorial Hospital v. California Employment Commission, 24 Cal. (2d) 669, 151 Pac. (2) 109. (Social Security tax).

Mulliner v. Evangelischer Diakonniessenverein, 144 Minn. 392, 175 N.W. 699.

Magnuson v. Swedish Hospital, 99 Wash. 399, 169 Pac. 828, 830, (1918).

Brattleboro Retreat v. Town of Brattleboro, 106 Vt. 228, 173 A. 209, 212, (1934), (Exemption from taxation).

Hearns v. Waterbury Hospital, 66 Conn. 98, (1895), 33 Atl. 595.

Lutheran Hospital Ass'n. v. Baker, 40 S.D. 226, 167 N.W. 148 (1918), (Exemption from taxation).

State v. H. Longstreet Taylor Foundation, 198 Minn. 263, 269 N.W. 469 (1936), (Exemption from taxation).

German Hospital v. Board of Review, 233 Ill. 246, 84 N.E. 215. (Exemption from taxation).

Barnes v. Providence Sanitarium, 229 S.W. 588, (Tex.Civ.App.)

County of Henepin v. Brotherhood of Gethsemane, 27 Minn. 460, 38 A.R. 298, (Exemption from taxation).

Maretick v. South Chicago Community Hospital, 297 Ill. App. 488, 17 N.E. (2d) 1012, 1013.

Union Pacific Railway Co. v. Artist, 60 Fed. 365, (C.C.A. 8th, 1894), (Railroad hospital).

Texas Central R. Co. v. Zumwalt, 103 Texas 603, 132 S.W. 113, 30 L.R.A. (N.S.) 1206, (Railroad hospital).

Carr v. Northern Pacific Beneficial Ass'n., 128 Wash. 484, 221 Pac. 981.

Richardson v. Carbon Hill Coal Co., 10 Wash. 656, 39 Pac. 95.

Wells v. Ferry Baker Lumber Co., 57 Wash. 658, 107 Pac. 869, 29 L.R.A. (N.S.) 426.

Barden v. Atlantic Coastline Ry. Co., 152 N.C. 318, 67 S.E. 971.

Thomas v. Postal Telegraph-Cable Co., 48 S.W. (2d) 422, (Ct. Civ. App. Tex. 1930).

Galveston H. & S. Ry. Co. v. Hanway, 57 S.W. 695, (Ct. Civ. App. Tex. 1900).

Southern etc. Sanitarium v. Wilson, 45 Ariz. 522, 46 Pac. (2d) 118, 125, 77 Pac. (2d) 458.

Bedford v. Colorado Fuel & Iron Corp., 102 Colo. 538, 81 Pac. (2d) 752, 759.

Miller v. Mohr, 198 Wash. 619, 89 Pac. (2d) 807.

McDonald v. Mass. Gen'l Hospital, 120 Mass. 432, 21 Am. Rep. 529.

Reynolds Memorial Hospital v. Marshall County Court, 78 West Va. 685, 90 S.E. 238 (1916).

Enell v. Baptist Hospital, 45 S.W. (2d) 395 (Tex. Civ. App. 1931).

City of Palestine v. Missouri-Pacific Lines H. Ass'n., 99 S.W. (2d) 311, (Ct. Civ. App. Tex. 1936).

Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211 (1939).

Rush Hospital Benev. Ass'n. v. Board of Sup'rs., 187 Miss. 204, 192 So. 829 (1940).

Piedmont Memorial Hospital v. Guilford County, 218 N.C. 673, 12 S.E. (2d) 265.

Virginia Mason Hospital v. Larson, 9 Wash. (2d) 284, 114 Pac. (2d) 976, (social security tax).

Beverly Hospital v. Early, 292 Mass. 201, 197 N.E. 641, 100 A.L.R. 1332.

City of Dallas v. Smith, 130 Tex. 225, 107 S.W. (2d) 872.

Illinois Central R. Co. v. Moodie, 23 Fed. (2d) 902 (C.C.A. 5th).

Scott on Trusts (1939), p. 1996.

Zollman on Charities, p. 188.

Trusts, Restatements, Sections 372, 376.

Bogert on Trusts (1935), Vol. 2, p. 1163.

Appendix C

The test of a charity is to be found in the purpose for which the institution is founded and exists. The motive of, or benefit to, a donor or settlor is immaterial.

Bogert on Trusts, Vol. 2, pp. 1126-7;

Fire Insurance Patrol v. Boyd, 120 Pa.St. 624, 6 A.S.R. 745, 750, 1 L.R.A. 417;

Fordyce & McKee v. Women's Christian Nat. Library Ass'n., 79 Ark. 550, 96 S.W. 155;

Harrison v. Barker Annuity Fund, 98 Fed. (2d) 286;

Union Pacific Railway Co. v. Artist, 60 Fed. 365 (C.C.A. 8th, 1894);

Parsons v. Childs, 345 Mo. 689, 136 S.W. (2d) 327, 332; Cert. den. 310 U.S. 640;

Old Colony Trust Co. v. O. M. Fisher Home, Inc., 301 Mass. 1, 16 N.E. (2d) 10 (1938);

Westport Bank & Trust Co. v. Fable, 126 Conn. 665, 13 Atl. (2d) 862, 866 (1940);

Noel v. Olds, 78 U.S. App. Dist. Col. 155, 159; 138 Fed. (2d) 581, 585;

Estate of Coleman, 167 Cal. 212, 138 Pac. 992.

Appendix D

That an institution makes a charge against members, or that its inmates pay a consideration on their admission, or that a school or hospital makes some charge to help defray the cost of its operation, does not affect the charitable character of such institution.

Bogert on Trusts, pp. 114-115;

Scott on Trusts (1939), p. 2032;

Estate of Lowe, 326 Pa. 375, 192 Atl. 405, 111 A.L.R. 518 (1937);

People v. Morton, 373 Ill. 72; 25 N.E. (2d) 504 (1940);

Little v. City of Newburyport, 210 Mass. 414, 96 N.E. 1032;

In re McDowell, 217 N.Y. 454, 112 N.E. 177;

In re Y. M. C. A. Retirement Fund Inc. 18 B. T. A. 139;

Episcopal Academy v. Phila., 150 Pa. 565, 573;

Summers v. Chicago Title & Trust Co., 335 Ill. 564, 167 N.E. 777;

Andrews v. Young Men's Christian Association, 226 Iowa 374, 284 N.W. 186 (Iowa 1939).

Appendix E

The restriction of benefits to its own members does not affect a nonprofit institution's charitable character.

Bogert on Trusts, Vol. 2, pp. 1124-25;

Hibernian Benevolent Society v. Kelly, 28 Ore. 173, 42 Pac. 3, 30 L.R.A. 167, 52 A.S.R. 769;

Morrow v. Smith, 145 Ia. 514, 124 N.W. 319;

United States v. Proprietors of Social Law Library, 102 Fed. (2d) 481, 484 (C.C.A. 1st, 1939);

Pease v. Pattison, L.R. 32 Ch. Div. 154, 55 L.J. Ch. N.S. 617, 54 L.T.N.S. 209;

Spiller v. Maude, 11 L.T. (N.S.) 329;

In re Buck (1896), 2 Ch. 727;

Carter v. Whitcomb, 74 N.H. 482, 487, 69 Atl. 779;

Widows' and Orphans' Home of O.F. v. Commonwealth, 126 Ky. 386, 103 S.W. 354;

Most Worshipful G.L. of A.F. & A.M. v. Board of Review, 281 Ill. 480, 117 N.E. 1016, 1017;

City of Indianapolis v. The Grand Master, &c, 25 Ind. 518, 522;

Estate of Lubin, 186 Cal. 326;

Estate of Henderson, 17 Cal. (2d) 853 (1941);

City of Petersburg v. Peterb'g Ben. Ass'n., 78 Va. 431, 436;

Estate of Lowe, 326 Pa.St. 375, 192 A. 405, 111 A.L.R. 518 (1937);

Troutman v. De Boissiere etc. Ass'n., 62 Kans. 621, 64 Pac. 33, (1901);

Northwestern Masonic Aid Association v. Chance, 154 Pa. 99, 26 Atl. 253;

In re Y. M. C. A. Retirement Fund, 18 B.T.A. 139;

Plattsmouth Lodge No. 6, A.F. & A.M. v. Cass County, 79 Neb. 463, 113 N.W. 167.